

Afghanistan's Guantánamo: Unfair Trials Exported

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While pre-trial motions continue at Guantánamo Bay, Cuba, at other end of the globe in Afghanistan more than 60 former Guantánamo and Bagram detainees have been convicted based on little more than mere allegations by the United States. After years of detention in U.S. custody without any due process, these detainees, although now finally in some legal process, are being tried by the Afghans in violation of basic fair trial standards.

Earlier this year I was in Kabul, Afghanistan, to examine the prosecutions of former Guantánamo and Bagram detainees. Over 250 Afghans from Guantánamo and Bagram have been transferred since April 2007 to the American-built Afghan National Defense Facility (ANDF) in Pul-i-Charkhi prison in the outskirts of Kabul. Defendants are being tried under a Soviet-era Afghan national security law and are being charged with crimes ranging from destruction of government and private property to assisting enemy forces. Of the 160 persons referred for prosecutions, since October 2007 over 60 have been convicted, and more than 40 have been sentenced to imprisonment for up to 20 years. Trials last between 30 minutes and an hour. There are no prosecution witnesses at the proceedings, no out-of-court sworn prosecution witnesses, and little or no physical evidence is presented. [See Human Rights First, *Arbitrary Justice: Trial of Bagram and Guantánamo Detainees in Afghanistan*].

I personally observed two trials while I was in Kabul—each lasting around 30-35 minutes. The prosecutor stood up and read a statement of the charges and the evidence to support the charges. The evidence consisted simply of what the United States military had accused the defendant of doing, including a summary of the circumstances of capture, and what the Afghan intelligence agency—the National Directorate of Security (NDS)—had found, years after the capture, to support the allegations. The defense counsel then stood, denied the allegations, and repeatedly enquired as to the source and validity of "evidence" relied on by the prosecutor. Members of the three-panel judge then asked the defendant questions and one judge read from the dossier (evidence file). In one trial, a judge showed a photograph to the courtroom of captured ammunition that was allegedly linked to a defendant. There was no discussion of the type of ammunition, who found it, who is now in possession of those weapons, or how the ammunition was allegedly—if at all—linked to the defendant.

There were no witnesses at either proceeding. One defendant was sentenced to 8 years and the other to 10.

In one of the trials I observed, the defendant did not even speak Dari—the language of the court proceedings—but spoke Pushto (which, like Dari, is one of the two official national languages of Afghanistan), and repeatedly looked to his lawyer for translation

assistance because the court provided no translator.

I was also able to examine the "evidence" the United States provided to the Afghans in these cases, and the results of the Afghan intelligence agency's own investigation. The U.S. evidence consisted of second-hand interrogation summaries; a two- to three-page form, which included a short description of the circumstances of arrest; and information about whether the detainee had undergone a polygraph test and the result of the test. There were no witness statements or even identification of government witnesses in these documents other than generically naming the detaining entities as Coalition Forces or Afghan National Army.

The Afghan intelligence agency documents included summary findings by the local NDS office where the alleged incident took place, and summarized incriminating statements about the detainee by unidentified witnesses. The NDS and national security prosecutor also interview every detainee and the answers to their questions were included as part of the dossier.

I asked a national security prosecutor about the quality of evidence, and he acknowledged that there are problems regarding the evidence, but he too was unable to get more from the United States. Still, he admitted, there is pressure from the United States to prosecute all the detainees.

A fundamental requirement of any fair criminal proceeding is that the defendant must be able to confront the evidence and question witnesses to the allegations. The former Bagram and Guantánamo detainees are completely denied of this right, in violation of both Afghan and international law.

The ANDF undoubtedly will continue to receive detainees in U.S. custody as more than 600 remain in Bagram and more than 30 Afghans are still in Guantánamo. But it is critical that, after years of confinement, any U.S. detainees transferred to Afghan custody who are charged with criminal violations of Afghan law have a fair adjudication of their cases. One way is for the Afghan government to demand from the United States names of witnesses to the allegations so that the prosecution can support any charges and the defense has the ability to mount a real defense. The United States, as the capturing and detaining power, should be willing make available witnesses for prosecutions.

The United States has made a policy decision to do just that in Iraq, where U.S. service members appear every day as witnesses in trials of suspected insurgents in the Central Criminal Court of Iraq. In Iraq the U.S. military trains soldiers and Marines in evidence collection and makes available soldiers for testimony in Iraqi trials of persons captured by the United States. The same principle should apply in Afghanistan.

The U.S. government's response to the findings of unfair trials has been to say that the trials are being conducted according to the Afghan justice system. These trials in fact are being conducted in contravention of the 2004 Afghan criminal procedure law, which on its face largely meets international fair trial standards. The United States is one of the

largest donors supporting justice sector reform in Afghanistan and is involved in writing laws, training judges, prosecutors, and mentoring the Afghan Attorney General's office. But in the case of these trials the United States is actively complicit in pressuring the Afghan government to disregard its own law and fundamental due process standards. If these trials are evidence of how justice reform donor countries in Afghanistan work to foster the rule of law, the snail's pace of judicial reform in Afghanistan is regrettably more understandable.

Once U.S. detainees who are Afghan nationals are turned over to the Afghan government, Afghan courts should be allowed—and equipped—to fairly decide the outcome. The rule of law should be the goal here, not the rubber-stamping of U.S. allegations.